2011 WL 9753721 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

John H. RISTROPH, Executor, Appellant,
v.
Paul Lucien RISTROPH, III, Appellee.

No. 2011-CA-00946.
November, 2011.

Appeal from the Chancery Court of Hancock County, Mississippi
Oral Argument Requested

Brief for Appellant John H. Ristroph, Executor

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*2 STATEMENT OF THE CASE

Appellant, John H. Ristroph, Executor, will hereinafter be referred to as “John” and Appellee, Paul Lucien Ristroph, III, will hereinafter be referred to as “Three” as he was referred to in the Lower Court. Robert Ristroph, the brother of John and Three will hereinafter be referred to as “Robert”. The Estate of Paul Lucien Ristroph will hereinafter be referred to as “The Estate” and Paul Lucien Ristroph will hereinafter be referred to as “Decedent”.

There was an appeal of the Lower Court's first Judgment (First Appeal) in Appeal numbered 2011-CA-00009, which was dismissed as being untimely. The First Appeal has been consolidated with this Appeal (Second Appeal) and the Record from the First Appeal has been transferred to the Second Appeal.

The cites in this brief to “RE” refer to the Record Excerpts of Appellant, cites to “1CP”, refer to the Clerk's papers in the Court file of the Chancery Court of Hancock County, Mississippi, used in the First Appeal, cites to “2CP” refer to the Court file of the Chancery Court of Hancock County, Mississippi, used in the Second Appeal, cites to “1T”, refer to the record transcript from the Chancery Court in the record of the First Appeal, cites to “2T”, refer to the record transcript from the Chancery Court in the record of the Second Appeal.

*3 A. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

This case involves the Estate of Paul Lucien Ristroph, Deceased. John is the Executor of the Estate of Paul Lucien Ristroph, Deceased. As the Executor, John filed his Petition to Set Aside Warranty Deed on August 10, 2009, in the Estate of Paul Lucien Ristroph. (RE 39-47, 1CP 48-56). John and the Decedent held the property as joint tenants, so John was seeking to restore the property to The Estate and recover possession of his real property. John sought to set aside a warranty deed from the Decedent to Three that used John's Power of Attorney to Decedent to transfer John's interest in the property to Three. John claimed that the Deed should be void because the Power of Attorney was not used to further the interests of the grantors and because it occurred when Three and Decedent were in a confidential relationship in which Three exerted undue influence on Decedent.

Three filed his Motion for Judgment on the Pleadings on September 3, 2010. (1CP 141-144). Three alleged that the statute of limitations had run prior to John filing the Motion to Set Aside the Deed. The Lower Court held that the three year Statute of Limitation had run using the catch-all three year statute. (RE 52-58, 1CP 153-159). The Court held that this case was based on fraudulent conveyance and cited *McWilliams v. McWilliams*, 970 So.2d 200 (Miss. Ct. App. 2007) as its authority for using a three year statute of limitation.

***4** The Lower Court further found this case distinguished from In Re Estate of Reid, 825 So.2d 1 (Miss. 2002), which concerned a deed given during a confidential relationship. John timely filed his Motion to Reconsider stating that his Motion was one on confidential relationship and undue influence, not fraud. (RE 59-65,1CP 163 - 169). The Lower Court denied the Motion to Reconsider and again stated that John's Motion was one regarding fraud in a deed. (RE 66-72, 1CP 359-365). John timely filed his Notice of Appeal (RE 108-109, 1CP 573 - 574), which was subsequently dismissed as being untimely. (RE 110).

After John filed his Notice of Appeal, he filed a Rule 60 Motion, citing *Estate ofHardy*, 910 So.2d 1052 (Miss. 2005). (RE 73-76, 1CP 582-585). The Lower Court denied the Motion finding that it lacked jurisdiction since the matter was on Appeal. (RE 98-107, 2CP 95-104). The Lower Court would not rule on the matters contained in the Rule 60 Motion because it felt it lacked jurisdiction. Also the Lower Court did not address how the misuse of a Power of Attorney would affect the validity of the deed as John argued in his Rule 60 Motion.

The Lower Court also did not address John's timely filing of a Petition to Court consisting of a Caveat that contested Three's claimed status as Executor of Decedent's estate based, in part, on undue influence. The Court thereby did not acknowledge legal action by John that would have satisfied even an incorrect three year statute of limitations. The Court further erred by allowing Three to gain an ***5** advantage by his illegally refusing to open probate, thereby not activating the Caveat and delaying the legal actions that eventually gave John access to the Decedent's financial and personal records that John needed to prove undue influence. Finally, the Court erred in ruling that Three opened probate by belatedly misfiling a Will in the Wills recording file at the Chancery Clerks office. All of these decisions were made without the Court's hearing any testimony whatsoever.

Feeling aggrieved, John appeals to this Court. (RE 111-112, 2CP 116-117).

B. STATEMENT OF THE FACTS

Paul L. Ristroph (Decedent) died on March 31, 2006. His sons, Paul L. Ristroph III (Three) and John H. Ristroph, met at his residence in Hancock County, Mississippi, that night. His third child, Robert M. Ristroph, stayed in Tomball, TX. John had been listed as Decedent's executor on all his Wills since the 1970‘s, but Three showed John what he claimed to be Decedent's last Will that named Three as executor.

Within one week's time, far earlier than required by any statute of limitations, John took legal action on April 6, 2006, and filed a Caveat to the alleged 2006 Will which Three had presented the night Decedent died. John cited, among other things, undue influence. (RE 20-22, 1CP 190-192). It is noteworthy that John personally filed the Caveat and that he had no trouble finding the temporary Clerk's facilities ***6** after Katrina. In fact, he described the correct office as being in the first in a row of temporary buildings, and the main entrance lead into the correct office.

Three avoided John's charge of undue influence by illegally refusing to probate Decedent's Will, and so John's Caveat claiming undue influence remained dormant, although it had been filed in a timely manner. This prevented legal action against Three, and it delayed John's access to Decedent's financial and personal records that would be needed to prove undue influence.

John filed to open The Estate using the only original Will in his possession (RE 26-29, 1CP 9-12) and what he believed to be the valid Last Will and Testament of the Decedent. The Will was admitted to probate by Judgment dated February 11, 2008, and Letters Testamentary were issued to John on April 3, 2008. (RE 23-25, 1CP 17-18, 20).

John was able to serve Robert with a Rule 81 Summons, but not Three, for the hearing to determine heirs. Robert did not appear at court, but Three did and claimed that he had Decedent's last Will. Judge Steckler told Three to get an attorney and file his Will as shown in paragraph 5 in the Judgment Establishing Heirs. (RE 37, 1CP 38,1T. 14-15). Repeated checks were made to see if Three had filed the Will, but the Clerk's office replied that Three had not done so. Three had the Will recorded in the land records and not filed for probate as he had been instructed. Three did not file the ***7** Will for probate in this case. He simply recorded the Will in the land records. (RE 30-35, 1CP 184-189)

Thereafter, John was ill and given little chance to live, but he recovered after roughly nine months. Then John continued the administration of Decedent's Estate, and he was finally able to access and examine Decedent's records as a result of his appointment as Executor. These records provided crucial documentary evidence that there was a confidential relationship between Three and the Decedent, that Three exercised undue influence over Decedent, and that Three received inter vivos gifts from the Decedent during the period of undue influence. John organized and reviewed that evidence with Counsel, and this marked the first time that Three's actions could be proven to be undue influence in a court of law. John then promptly filed a Petition to set aside the deed giving Decedent's home to Three (RE 39-47, 1CP 48-56), alleging that there was a confidential relationship between Three and Decedent and that Three had exerted undue influence on Decedent. Three was served with process and obtained Counsel and a hearing was set for September 7, 2010, regarding John's charge against Three of undue influence.

On the date of the trial, September 7,2010, Three's attorney stated that he was not prepared to discuss undue influence, notwithstanding he had filed pre-trial motions (1CP 120-125 and 141-144), since he felt that the case was supposed to be about whether Three's Will was valid. Three then produced for the first time a notice ***8** from the Clerk's office that Three had recorded a Will, something he had not noted in pre-trial motions. Three also neglected to inform the Court that his attorney filed the 2006 Will in this proceeding but had failed to provide the 2006 to counsel for John. Three had personally recorded the Will in the Office of the Chancery Clerk where it could not be found, despite Judge Steckler's prior admonition to get an attorney and have the Will filed for probate in this proceeding. The 2006 Will was finally filed in the Court file on September 3, 2010. (RE 30-34, 1CP 147-151).

The Court forgave Three for recording the Will on August 13,2008, by citing the chaos that existed due to Katrina's landfall three years earlier on August 29,2005, a situation that had not impaired John's properly filing his Caveat on April 6, 2006, only eight months after Katrina. No testimony was heard on the supposed conditions that exonerated Three's actions, nor was John allowed to present arguments related to Three's undue influence, and that part of the case was continued. However, Three made his argument as to the Statute of Limitations on the Deed. No evidence has ever been presented or taken in this case, only attorney's arguments. The Court instructed the attorneys to obtain a trial date when the matter could be heard. The attorneys obtained the Court date of December 2, 2010, for a full trial on the merits of the case.

After the hearing on September 7,2010, John obtained a copy of the Will that Three had misfiled by recording it and not filing it for probate, thereby not activating ***9** John's properly filed Caveat and its charge of undue influence within what Three later claimed to be the statute of limitations.

On September 13, 2010, the Court filed its Order on Three's Motion on the Pleadings to dismiss John's Petition to Set Aside the Warranty Deed transferring Decedent's home to Three, holding that the statute of limitations had expired prior to John filing his Petition. John filed his Motion to Reconsider on September 17, 2010, (RE 59-65, CP 163-169). The Court heard John's Motion to Reconsider on November 16, 2010. On November 30, 2010, the Court filed its Order on John's Motion to Reconsider denying the Motion. (RE 66-72, 1CP 359-365). John perfected his Appeal on December 28,2010. (RE 108-109,1CP 573-574). This was the First Appeal.

While waiting on the record to be prepared for the First Appeal filed on December 28,2010, John filed a Rule 60 Motion regarding the Order on the Statute of Limitations and Warranty Deed. (RE 73-76, 1CP 582-585). John's position was that the Deed was *void ab initio* since his Power of Attorney was not in his best interests to transfer his property to Three. John

cited *Estate of Hardy*, 910 So. 2d 1052 (Miss. 2005) in his Memorandum Brief as support for the Chancellor to set aside its previous ruling regarding the running of the statute of limitations on the Warranty Deed. John filed his Rule 60 Motion and his Memorandum Brief in Support of his Rule 60 Motion on or about February 17, 2011. The record was not ***10** prepared and was not transmitted to the Supreme Court at the time that the Rule 60 Motion was filed.

On the trial date of March 21, 2011, the Court found that it could not hold a hearing on the contest of the 2006 Will and *inter vivos* gifts, since Robert had not been noticed for the trial date. The Court would not allow Service by Publication even though Robert was shown to have deliberately evaded service, to the extent of engaging in a high speed chase and allowing co-workers to lie to the process servers. The Court used the time set for this trial to conduct a hearing on John's Rule 60 Motion, as well as other Motions. At the Rule 60 Motion hearing John argued that Three's undue influence and Decedent's use of John's Power of Attorney made the Decedent's transfers of property to Three void ab initio, so the Deed never legally existed. Once again, the Court allowed no evidence of undue influence to be presented. At the time of this hearing, the record still had not been transferred to the Mississippi Supreme Court and according to the Case law, the Hancock County Chancery Court retained jurisdiction to hear the Rule 60 Motion. *Ward v. Foster*, 517 So 2d. 517 (Miss. 1987); *Griffin v. Armana*, 679 So 2d 1049, 1050-51 (Miss. 1996). Those cases hold that the Chancery Court of Hancock County, Mississippi could render an Order on a Rule 60(b) Motion although an appeal had been filed.

The Lower Court entered its Order denying Three's Motion for Summary Judgment and John's Rule 60 Motion on June 2, 2011. (RE 98-107, 2CP 95-104). ***11** These facts can be determined from the Case Summary filed in the Court file. (RE 15-19, 2CP 108-112).

SUMMARY OF THE ARGUMENT

This action arises out of a Motion to Set Aside Warranty Deed from Decedent Paul Lucien Ristroph, Deceased ("Decedent") to Paul Lucien Ristroph, Ill ("Three") using John's Power of Attorney. (RE 43-47, 1CP 52-56). The Motion was filed by Executor John H. Ristroph.

John was appointed by Judgment of this Court as Executor of the Estate of Paul Lucien Ristroph, Decedent, on or about February 11, 2008. (RE 23-25). After that time, John found Decedent's diaries in his home. Financial records in the home had already been cleaned out by Three, but Three had left the diaries because they were in a drawer and were not conspicuous. Those diaries detailed how Three was involved with the Decedent as shown by paragraph 8 of John's Affidavit. (RE 86, 1CP 408) Further, John was able to obtain the bank records of Decedent after he was appointed as Executor. An examination of those records revealed the inter vivos gifts that were made by Decedent to Three. (RE 86 paragraph 7, 1CP 408). It was then that John knew that there was a confidential relationship during the time that the deed, as well as other inter vivos gifts, were made and further that Three was exerting undue influence on Decedent. (RE 86, 88-89, 1CP 408, 410-412). After that time, ***12** the Executor filed his Motion to Set Aside Warranty Deed and Motion to Set Aside *Inter Vivos* Gifts.

Further, Eleanor DeJarnette and Patti Jones have filed their Affidavits, (RE 93-97, 1CP 568 - 572) which detail that Three was not only in a confidential relationship with Decedent but that he badgered this 97 year old man on strong medications for pain, dementia, and depression (1CP 566-567) to the point of tears about his Will and his financial records.

This case is all about Three having a confidential relationship with Decedent. The facts, if allowed to come out at trial, would have shown that the confidential relationship began in 2003. Further, the confidential relationship existed until the death of Decedent on March 31, 2006. During the time that Decedent and Three were in a confidential relationship, Decedent made inter vivos gifts to Three. Further, the Affidavits of Eleanor DeJarnette (RE 93-95, 1CP 568-570) and Patti Jones (RE 96-97, 1CP 571-572) and Decedent's own words in his diaries show that Three exerted undue influence on Decedent regarding his Will and his financial matters. Three filed no Affidavits and provided no facts regarding the confidential relationship he had with Decedent. John did file his Affidavit (RE 84-92), with supporting documents, (1CP 406-567) to defeat Three's Motion for Summary Judgment. (RE 77-83, 1CP 280-286).

***13** The one reference that Three did make was to assert that John should have known that he, Three, was in a confidential relationship with and that he exerted undue influence on Decedent. (RE 80-81, 1CP 283-284). Executor believes that the confidential relationship and admitted undue influence by Three makes any inter vivos gifts to Three void. The case law cited in this brief confirms that the gifts are void if given during a confidential relationship between Decedent and Three.

It was John's clear fiduciary responsibility as Executor to request the Lower Court to set aside the deed and restore it to Decedent's holdings at the time of his death. This deed was an *inter vivos* gift made by Decedent to Three because of the confidential relationship that Three had with Decedent and further because Three has not rebutted the presumption of undue influence while he was in a confidential relationship with Decedent. That makes the gift void. Further, Three has admitted his undue influence on the Decedent when he was in a confidential relationship. (RE 80-81, 1CP 283-284).

It should also be recognized that the Lower Court's barring of testimony prevented John from presenting quitclaim deeds between Three and John that were made with the knowledge and approval of the Decedent. Three executed a deed to John giving all of Three's interest in Decedent's property to John. (RE 50-51, 1CP 559-560), in exchange for John's giving his interest in their mother's property to Three. Three's deed to John very specifically states that Three "grants, sells, ***14** conveys, transfers, assigns, quitclaims and relinquishes forever" to John "[a]ny and all interest whatsoever that I may have in my father's (Paul L. Ristroph), succession." Succession is defined in *Black's Law Dictionary* as possessing a somewhat broader meaning of the acquisition of rights upon the death of another rather than a reference to an estate. What Three did through his confidential relationship and through his admitted undue influence is to cause the Decedent to make transfers as *inter vivos* gifts to him, some of which occurred during his lifetime, some of which occurred on the date of his death. Nonetheless, Three used that confidential relationship and undue influence to gain property which he had agreed not to take. Further, all of the Wills of Decedent from 1994 show that Three was not to take any of the property of Decedent. (1CP 430-505) In fact, beginning with the Codicil to Decedent's Will dated August 21, 1993, Decedent stated that Three had obtained all that he should from his properties. Further, there are five (5) Wills after the Codicil dated August 26,1994, that leave Three out of the Decedent's Mississippi property. Those Wills are dated March 18, 1995, July 9, 1997, June 3, 1998, September 9, 1999, and June 2, 2000. (1CP 430-505). After 1994, the Decedent made a Codicil and five (5) Wills providing nothing for Three out of his estate in Mississippi. It was not until after the undue influence began with Three that Decedent deeded him the property in question. There was a confidential relationship ***15** between the Decedent and Three and there was undue influence in the preparation of that deed.

ARGUMENT

I. THE CHANCERY COURT ERRED WHEN IT DID NOT FIND THE DEED VOID AB INITIO WHEN DECEDENT USED JOHN'S POWER OF ATTORNEY TO TRANSFER JOHN'S INTEREST TO THREE.

On or about June 22,2005, Decedent PAUL LUCIEN RISTROPH transferred property from Decedent and John to Three and Decedent. (RE 43-47, 1CP 52-56).

The Deed shows that a Power of Attorney from Dr. John H. Ristroph to Decedent (dated July 1, 1998) was used to transfer his interest in the real property. The Deed itself states that PAUL LUCIEN RISTROPH, was the attorney in fact for Dr. John H. Ristroph. This property had been deeded to Decedent and John by Warranty Deed on July 8, 1998. (RE 48-49, 1CP 603-604).

The Lower Court found that the transfer of the real property by the Warranty Deed, occurred three (3) years prior to Executor filing his Petition to Set Aside Warranty Deed and found that the statute of limitations had run on setting aside a warranty deed based on fraud.

John tried to draw the Court's attention to the fact that it used a wrong theory of law in this case. Three convinced the Lower Court that it must find that there is a three year statute of limitation because of fraud. All of his cases cite fraud. When it comes

to a confidential relationship and undue influence resulting in inter vivos ***16** gifts, the use of fraud is an improper application of the legal standard. *Griffin v. Armana*, 687 So. 2d 1188, 1196 (Miss. 1996).

Simply stated, the Lower Court erred when it failed to recognize no statute of limitations applies to *inter vivos gifts that are void ab initio.* The transfer of property never legally exists. Moreover, the Mississippi Supreme Court has said that the statute of limitations is not an issue where there are inter vivos gifts made during a confidential relationship. They are *void ab initio. Estate of Hardy*, 910 So. 2d 1052, 1053, 1056 (¶ 19) (Miss. 2005).

There is also another compelling reason that the Decedent's *inter vivos* gift of deed to Three is void. The Decedent executed a deed to himself and Three by using John's Power of Attorney to the Decedent to gift John's interest in the property to Three. That deed was void ab initio because John, in fact, received no consideration whatsoever for the property and was harmed by the transfer: "An agent must act in the best interest, and not to the detriment of, his principal." *Estate of Hardy*, 910 So. 2d at 1055 (¶13). The Mississippi Supreme Court ruled in *Hardy* that the Lower Court erred in holding that the statute of limitation ran on bringing the Motion to set aside that deed. The lower court in *Hardy* also used the incorrect legal standard and found that the Executor was trying to overturn that deed based on fraud. However, the *Hardy* Court held that there is no statute of limitations on a deed that is *void ab initio.*

***17** The parallels between the *Hardy* case and the current one are clear. It is a simple matter of record in this case that, John, the Executor, neither filed a Motion alleging fraud nor did he assert fraud in the proceedings. Further, the use of John's power of attorney to transfer the property from Decedent and John to Decedent and Three was an illegal use of the power of attorney and that deed is *void ab initio. Id.* at ¶ 17. At Because that deed was *void ab initio* there can be no statute of limitations for that deed. *Id.* at ¶19.

There are other rulings supporting that principle that Inter Vivos gifts made when there is a confidential relationship between donor and donee are presumptively void, for example:
This Court, in *Croft v. Alder, 237 Miss. 713, 115 So.2d 683 (1959)*, noted the following:

[T]he rule applied in the case of gifts *inter vivos*, as by deed, [is] that where a confidential relation exists between donor and donee, it is presumptively void and the burden rests on the donee to produce clear and convincing evidence that the gift is free from the taint of undue influence...

Id. 115 So.2d at 687-88.

Griffin v. Armana, 687 So. 2d 1188, 1196 (Miss. 1996).

The Mississippi Supreme Court in *Hardy* was extremely clear regarding the inapplicability of a statute of limitations when deeds are void:
***18** ¶19. The sisters' claim that the deeds were void because they were not properly executed, notarized and acknowledged is moot because the deeds were never recorded. The applicable statute of limitations and the proper venue are not issues because the deeds were void ab initio.

Estate of Hardy, 910 So. 2d 1052, 1056 (¶19) (Miss. 2005). In the instant case, there was a gift of land which is *void ab initio* and hence the "applicable statute of limitations" is not an issue.

This logic is further propounded in *Black's Law Dictionary* definition of void: "Null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended." *Black's Law Dictionary* definition of *void ab initio* is: "A contract is null from the beginning if it seriously offends law or public policy in contrast to a contract

which is merely voidable at the election of one of the parties to the contract." Both of those definitions contain the word void. Both of them show that when a gift is void, it never has any legal standing; it is as though it was never done. That means that a Court must set aside a void gift. When that gift is set aside, that asset must be brought back into the Estate. There is no statute of limitations on void gifts. *Estate of Hardy*, 910 So. 2d 1052, 1056 (¶19) (Miss. 2005).

Since there is no state of limitation, this Court should reverse the Lower Court's Judgments on the Statute of Limitation, (RE 52-58; RE 66-72; RE 98-107) ***19** and remand this case to the Lower Court for a full hearing and allow the evidence to be presented in this case.

II. THE CHANCERY COURT ERRED WHEN IT HELD WITHOUT EVIDENCE OR TESTIMONY THAT THIS WAS A MATTER REGARDING A FRAUDULENT CONVEYANCE AND THAT THE THREE YEAR STATUTE OF LIMITATION APPLIED TO A DEED GIVEN IN A CONFIDENTIAL RELATIONSHIP AND AS A RESULT OF UNDUE INFLUENCE.

A. The Lower Court used a three (3) year Statute of Limitations based on fraud.

Three cited cases which deal with fraudulent conveyances of land to show that a three (3) years statute of limitation should apply. Basically, Three had the Lower Court use *McWilliams v. McWilliams*, 970 So. 2d 200 (Miss. Ct. App. 2007) as precedent to say that John allowed the statute of limitations to expire before he filed his Motion to Set Aside Warranty Deed. The Lower Court used the McWilliams case where the Court of Appeals held that actions regarding fraudulent conveyance of land should be brought within three (3) years of the deed or the statute of limitations runs. The actions in *McWilliams* were based on fraud. As the Executor claimed and showed, this is not an action on fraud nor is fraud the proper legal standard to use when there is a confidential relationship.

A proper discussion of *McWilliams* and its history will show that fraud is not the proper legal standard to apply when there is an allegation of undue influence ***20** based on a confidential relationship or when the deed was prepared using a power of attorney, which violated the fiduciary duty of the grantor.

In *McWilliams v. McWilliams*, 970 So. 2d 200, (Miss. Ct. App. 2007), the man who deeded the property to his son or a **trust** was attempting to have the deed set aside on the grounds of fraud. There a father had transferred property to his son while he was in jail and he claimed it was a fraudulent conveyance. The Court found that the three (3) year statute of limitations applies when the action is brought on fraudulent conveyance. The Court concluded that the three (3) year statute of limitations in Mississippi applies to an action to set aside a deed on the basis of fraud. *McWilliams*, 797, So. 2d at 204 (¶ 10). However, in this case John has alleged a confidential relationship not fraud.

McWilliams based its finding on *O'Neal Steel, Inc. v. Millette*, 797 So. 2d 869 (Miss. 2001). In *O'Neal Steel, Inc.*, a creditor had a foreign Judgment and he attempted to set aside a deed from the father, which was the debtor, to the debtor's son as a fraudulent conveyance. Had he been successful, the deed would have gone back to the father (debtor). The creditor's Judgment would then attach to that property and he could have seized the property under the Judgment statute. The Court in *O'Neal Steel, Inc.* found authority in the 5th Circuit Court of Appeals when addressing which statute of limitation is applicable to set aside a conveyance induced by fraud. There the Court relied on *Suthoff v. Yazoo County Indus. Dev. Corp.*, 722

***21** Fed. 2d 133 (5th Cir. 1983) as its authority. As previously stated, *O'Neal Steel, Inc.*, sought to have the deed set aside from Millette to his son as a fraudulent conveyance to avoid a creditor. Millette was able to defeat the Judgment of the creditor by transferring his property to his son. The problem is that the creditor did not bring the suit to have the fraudulent conveyance set aside within the three (3) year statute of limitations. Again, fraud was the legal standard used in the action in *O'Neal Steel, Inc.*

In *Suthoff v. Yazoo County Indus. Dev. Corp.*, 722 Fed. 2d 133 (5th Cir. 1983), the Plaintiffs were complaining that the attorneys and others caused them to transfer their property through fraudulent conveyances. In Suthoff, the Court determined that the

three (3) year statute of limitation was applicable where a person conveyed his property out and was attempting to regain that property and claimed fraud. That case was the authority for *O'Neal Steel, Inc.* which was the authority for McWilliams. In Suthoff, the Plaintiffs alleged that they sold their property to the grantee at a low price because they had been fraudulently induced to so do. The Plaintiffs alleged fraud. They did not allege undue influence or a confidential relationship. The parties alleged that they were fraudulently induced to sell the property because they thought the property was going to be sold under Eminent Domain, when in fact Yazoo City had withdrawn its Eminent Domain proceedings four days prior to the sale of the property. There the Court was faced with the decision of which statute applied, the ***22** ten (10) year statute or the three (3) year statute. The Court stated that since this action was based on fraud that the three (3) statute of limitations as provided in West's A.M.C. § 15-1-49 (1999), the Catch All Statute, was the statute to apply where the action was based on fraud. Again, this was a matter related to land and an action based on a fraudulent conveyance. In the instant case, we are not talking about fraud. We are talking about a confidential relationship and undue influence. Clearly, the three (3) year statute of limitations as applied in *McWilliams* and its predecessors is not applicable here.

The *Suthoff* Court relied on an ALR article found in 18 ALR 169 (1939) to address the statute of limitations issue it had before it. The ALR article relied on by the *Suthoff* Court was based on *Davidson v. Salt Lake City*, 81 P. 2d 374 (Utah 1938). In Davidson, the man sold a strip of land to Salt Lake City through a lawyer. The man gave the lawyer a letter to go with the deed that said the city had to have curbs, sidewalks and setbacks and so forth on the property that he gave the city for a road. The lawyer was infuriated because he thought someone was trying to tell him what to do so he sent the deed on to the Council without the letter. The deed was then entered and some four or five years later when the city did not do what the man said, he wanted the property back. He filed suit and the Court said because this deed was obtained by fraud, then he only had the three year period provided for fraud to recover the property. The man had filed his suit outside the three year period.

***23** Again, it is clear from the *Davidson* case in the ALR article that was used in the *Suthoff* case to *O'Neal*, then to *McWilliams*, that all of the actions were based on a fraudulent conveyance. It had nothing to do with whether there was undue influence in the making of the deed. That is clearly distinguished from the instant case.

The bottom line is that John did not allege fraud. He alleged there was an inter vivos transfer of real property during a time when there was a confidential relationship. That transfer is presumed void. Further, Three has admitted that he was asserting undue influence on the Decedent and that makes the deed void. (RE 80-81, 1CP 283-284). It is also extremely significant that in *McWilliams*, the creditor never had a possessory interest in the land, which is the premise of the ten (10) year statute. In the current case, John had a possessory interest that was illegally transferred using his Power of Attorney.

As can be seen by *McWilliams* and the cases that were relied on to reach the *McWilliams* holding, all the actions were based on a fraudulent conveyance. John never alleged there was a fraudulent conveyance. He asserted a possessory interest in real property that was illegally transferred using his Power of Attorney due to a confidential relation and undue influence. To rely on those cases to hold that there is a three (3) year statute of limitation due to fraud is a clear and obvious error. To ***24** rely on fraud, when there was an *inter vivos* transfer would be to imply the wrong legal standard. *Griffin v. Armana*, 687 So. 2d 1188, 1196 (Miss. 1966).

B. The deed was given during a confidential relationship.

Executor has alleged that Three and the Decedent were in a confidential relationship at the time that Three received the deed from Decedent.

¶14. "The law in this state on fiduciary or confidential relationships and undue influence is well settled." *Wright. 797 So.2d at 998(¶16).* "Its application has been made to both inter vivos and testamentary transactions." *Id.* In application to inter vivos gifts, the question is generally a two-step process involving shifting burdens of proof. As for the first step, the burden is on the plaintiff who seeks to have a chancellor set aside an inter vivos gift. If a plaintiff can demonstrate, by clear and convincing evidence, the existence of a confidential relationship between a grantor and a defendant grantee, a rebuttable presumption of undue influence

arises regarding any inter vivos transactions between the grantor and the defendant grantee. *Id. at (¶ 21).* Accordingly, our first inquiry is whether there was a confidential relationship between the grantor of the deed, Ann, and the grantee, Sharnee.

¶ 16. "[O]nce the presumption of undue influence has been established, the burden of proof shifts to the beneficiary/grantee to show by clear and convincing evidence that the gift was not the product of undue influence." *Id.*

Howell v. May, 983 So.2d 313, 317-18 (¶¶14, 16) (Miss. Ct. App. 2007).

In the instant case, the Lower Court did not even reach the first step in determining whether there was a confidential relationship, which could void the deed. ***25** Instead, the Lower Court simply looked at the time between the date of the deed and the date of John's Motion and determined that the statute of limitation had expired based on fraud prior to John filing his Motion. The Lower Court could not reach the first step without evidence and testimony. The Lower Court should have determined if there was a confidential relationship and if so, the burden would have shifted to Three to show there was no undue influence. The Lower Court erred when it did not allow a trial before it dismissed John's Motion.

The Lower Court's ruling did not note Three's admission in paragraph 5(6) of his Motion for Summary Judgment that John should have recognized that he was in a confidential relationship with Decedent and that he exerted undue influence on him. (RE 80-81, 1CP 283-284). Any gifts that were made from Decedent to Three during the confidential relationship are presumed void. That is well settled law in the State of Mississippi and the cases are legion.
¶49. "When dealing with an inter vivos gift, we have held that a confidential relationship alone is sufficient to raise the presumption of undue influence." *Greenlee v. Mitchell,* 607 So.2d 97, 105 (Miss.1992). "[W]hen there is a fiduciary or confidential relation, and there is a gift or conveyance of dubious consideration from the subservient to the dominant party, it is presumed void." *Griffin v. Armana, 687 So.2d 1188, 1193 (Miss.1996).* "This is not because it is certain the transaction was unfair; to the contrary, it is because the Court cannot be certain it was fair." *Id.*

***26** ¶ 50. To overcome the presumption of undue influence as it relates to the receipt of an inter vivos gift, and to avoid having the gift declared void, the recipient must offer clear and convincing evidence that the gift was the result of the free and independent determination of the giver. The evidence that is sufficient to overcome the presumption that the gift was the product of undue influence and, therefore, void must be something more than the self-serving testimony of the recipient. *See In re Estate of Smith: Irving v. Streater, 827 So.2d 673, 683(¶ 4) (Miss.2002).*

In Re Estate of Hall, 32 So. 3d 506, 519-520 (¶¶149-50) (Miss. Ct. App. 2009) (Cert. denied 2010). Three has never offered any evidence with regard to the deed. He has not overcome the presumption of undue influence.

Further, it has long been the policy of the Mississippi Supreme Court to void *inter vivos* gifts made during a confidential relationship. Such gifts are void unless the person comes forward with evidence, something more than self-serving testimony, to show that there was no undue influence when the gifts were given. Three has not just failed to present any evidence or file any affidavits, he has admitted both his confidential relationship and undue influence. This Court is hereby requested to declare the deed - void, or at a minimum send this case back to the Lower Court for testimony and evidence. The statute of limitations, if one should be applicable, has not run on this matter.

> The legal principle which declares that a benefit conveyed by a beneficiary unto his trustee is presumptively void is not new. It was a long-settled principle of law prevailing

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